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Torts -- Defamation of Character by Radio

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into interstate commerce, if the drugs should *subsequently* be misbranded, even as long as 18 months later, while being held for sale.[13]

The minority suggestion that Section 301(k) rather than Section 301(a) should have been applied to the separate shipments is questionable. As the Court pointed out, Section 301(k) does not reach situations where the manufacturer sells directly to the consumer. In addition, it does not apply to the shipper who first sends literature, and then the drugs, as was the situation in several of the shipments in the instant case.[14] Moreover, even the dissenting opinion still leaves doubt as to the line of cleavage between Section 301(a) and Section 301(k), since the drugs and literature were shipped only two days apart in one of the separate shipments.[15]

The Court's holding, on the other hand, is unmistakable. No apparent hiatus remains in the Act.

TORTS—DEFAMATION OF CHARACTER BY RADIO

Plaintiff alleged defamation of his character arising from a radio speech made by defendant Hoffman while using the facilities of defendant Trent Broadcasting Corporation. Plaintiff appealed from an order declaring that his bill did not state a cause of action against Trent Broadcasting Corporation. *Held,* reversing the lower court, that plaintiff's declaration sufficiently stated a cause of action against defendant broadcasting corporation based on negligence, and an action for defamation of character by radio would lie. The dissenting judge argued that liability should be based on the absolute liability doctrine. *Kelly v. Hoffman,* 61 A.2d 143 (N.J. 1948).

The instant case demonstrates the confusion existing with regard to the liability of a radio broadcasting company for defamation made by another while using its facilities. This conflict exists partially because the courts are not in accord as to what constitutes libel [1] or slander [2] with regard to radio broadcasts; however, this distinction is not of importance in the present case as the broadcasted matter was held actionable per se.

13. One of the shipments in question involved laxative tablets, bearing statutorily adequate labels. They were shipped on July 10, 1942. The mislabeling came through literature shipped to the same consignee on January 18, 1944, over 18 months later. It was not claimed that anyone had been harmed by the tablets, but evidence was given that the booklets contained false statements concerning their efficacy.

On the other hand, it should be noted that the dissenting opinion is silent as to the facts in the remaining twelve shipments. In these shipments the time span between drug and literature shipment dates varied from two to 184 days.

14. See Record, pp. 432-438, containing table showing dates of shipment: Brief for Appellees, pp. 4, 5.

15. See note 13 *supra.*

1. Hartmann v. Winchell, 296 N.Y. 296, 73 N.E.2d 30 (1947) (libel is a statement made in some permanent, visible form. Visibility of the writing is not necessary when the defamatory matter is so widespread and has been disseminated to such a large number of people that it takes on the characteristic of permanence). See Note, 171 A.L.R. 765 (1947).

2. Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937) (slander is a statement in spoken words or other transitory form. Words transmitted over the air waves do not have

The earliest cases regarding radio defamation [3] were based on the doctrine of absolute liability. This doctrine was disregarded in a Pennsylvania case [4] which held that the radio station's liability must be based on negligence. In the earlier cases the defamatory statements were made from previously prepared scripts, while in the *Summit* case the statements were made extemporaneously.

Though the court in this case relies on the *Summit* case [5] it is distinguishable. Here, the statement was read from a prepared manuscript which defendant broadcasting company had an opportunity to examine, while in the former case the actionable statement was "ad libbed." The "ad libbing" cases have been decided on the basis of negligence,[6] and these holdings are approved by a leading text writer on radio defamation.[7] These cases should be differentiated from those imposing an absolute liability when the statement is made from a previously prepared script.[8]

When the script is available for inspection, as in the present case, most courts agree that the radio station should assume absolute liability.[9] This result is reached by drawing an analogy between a radio station and a newspaper.[10] In the "ad libbing" cases [11] it is reasonable to base the liability on negligence since "ad libbing" is difficult for the radio station to control.[12]

Some jurisdictions have settled this conflict by legislative action.[13] However, in the absence of such legislation the courts should not impose the negligence doctrine in the prepared script situation. As the dissent stated, the absence of statutory restriction should not prevent a proper balancing of all the interests. The fact that the radio station knew of the defamatory matter and failed to take any action to prevent its broadcast should be considered in the light of the present harm inflicted on an innocent member of the public. In such a situation it would seem that the broadcasting station in effect has approved the defamatory matter.

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the permanence of a written statement, especially when they are extemporaneous interpolations).

3. Sorensen v. Wood, 123 Neb. 348, 243 N.W. 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933); Coffey v. Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo. 1934).

4. Summit Hotel Co. v. National Broadcasting Co., 336 Pa. 182, 8 A.2d 302 (1939).

5. See note 4 *supra*.

6. Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (1942); Summit Hotel Co. v. National Broadcasting Co., *supra*; Locke v. Gibbons, 164 Misc. 877, 299 N.Y.S. 188 (1937).

7. 2 SOCOLOW, LAW OF RADIO BROADCASTING §§ 476, 477 (1939).

8. See note 3 *supra*.

9. See note 3 *supra*.

10. Notes, 17 ORE. L. REV. 307 (1938); 38 MICH. L. REV. 415 (1940); 26 A.B.A.J. 490 (1940) (radio stations compete vigorously with newspapers for advertising; have the same opportunity to check manuscripts; may indemnify themselves against loss by increase in advertising charges; disseminate to a large group of people; and their effect is just as permanent).

11. See note 6 *supra*.

12. See Note, 124 A.L.R. 982 (1940).

13. FLA. STAT. § 770.04 (1947) (no owner or licensor of a radio station shall be liable for damages for any defamatory statement uttered over its facilities unless the complaining party proves negligence on the part of the owner or licensor).

Here, the court in deciding in favor of lessor liability cited as authority a case which had entirely different facts and created a completely separate problem. *Query,* what effect will the instant case have on future litigation? It appears that the New Jersey court has misapplied the negligence doctrine in this instance in applying it to a prepared script case when its rationale is limited to "ad libbing" situations. It would seem that the distinction is a valid one and that it should be maintained.

TORTS—NEGLIGENCE—LAST CLEAR CHANCE—EFFECT OF CONTINUING NEGLIGENCE

Administratrix brought an action under a wrongful death statute for damages resulting from the negligent killing of deceased. Deceased had parked his truck so that it protruded upon a highway in violation of a state statute. While he was under the truck, it was negligently hit by defendant, killing deceased. *Held,* that the contributory negligence of deceased bars the action of his administratrix. *Haase v. Willers Truck Service,* 34 N.W.2d 313 (S.D. 1948).

The court commented that if the plaintiff had asserted that the defendant had the last clear chance to avoid the accident, and was therefore liable, the plaintiff still could not have recovered because of the deceased's continuing negligence. The dissent maintained that the deceased's continuing negligence would not have prevented the assertion of the last clear chance doctrine by the plaintiff because such continuing negligence was of a passive nature.

Where a defendant seeks to avoid liability for his negligent injury to the plaintiff by proving contributory negligence, the plaintiff usually asserts that the defendant had the last clear chance to avoid the injury and is, therefore, liable under the last clear chance doctrine. Where the defendant actually sees the perilous situation in which the plaintiff has involved himself by his contributory negligence in time to avoid the injury, it is generally held that the defendant has the last clear chance to avoid the accident even though the plaintiff is physically able to extricate himself from the perilous situation but, through his own inattentiveness, fails to do so.[1] In those situations where the defendant did not actually discover the peril of the plantiff but, by the use of reasonable care, ought to have discovered such peril, it is generally agreed that the defendant will be held to have had the last clear chance to avoid the injury if the plaintiff was physically unable to extricate himself from the perilous situation.[2]

If, however, the plaintiff was physically able to extricate himself from the situation of peril which he created by his own contributory negligence,

1. Merchant's Transport Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933); See Note, 92 A.L.R. 83, 86 (1934).

2. Merchant's Transport Co. v. Daniel, 109 Fla. 496, 149 So. 401 (1933); Dunn Bus Service v. McKinley, 130 Fla. 778, 178 So. 865 (1937).